

BRB No. 97-1526 BLA

PAULINE ROSNICK)	
(Widow of JOHN ROSNICK))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BELLAIRE CORPORATION)	DATE ISSUED:
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Pauline Rosnick, Powhatan Point, Ohio, *pro se*.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's surviving spouse, appeals without the assistance of counsel, the Decision and Order - Denying Benefits (97-BLA-0376) of Administrative Law Judge Thomas M. Burke on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed this survivor's claim in January, 1996.¹ Director's Exhibit 1. The administrative law judge accepted a stipulation by the parties that the decedent worked as a coal miner for forty-one years. Decision and Order at 3. The administrative law judge found that the autopsy and medical opinion evidence was sufficient to establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a). Further, the administrative law judge found that the evidence was insufficient to establish that coal worker's

¹ The miner filed three claims for benefits. The miner's last claim was filed in August, 1988 and was finally denied by an administrative law judge on May 14, 1991. Director's Exhibits 23, 24. The miner died on August 24, 1994. Director's Exhibit 3.

pneumoconiosis was the cause of, or substantially contributing cause or factor leading to, the miner's death. 20 C.F.R. §718.205(c). Accordingly, benefits were denied. Claimant appeals, arguing generally that the administrative law judge erred in denying benefits. No response brief has been received from employer. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the appeal unless specifically requested to do so by the Board.²

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only where the miner suffered from pneumoconiosis arising from coal mine employment and where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis or where complicated pneumoconiosis is established. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit, within whose

² We affirm the administrative law judge's decision to credit the miner with forty-one years of coal mine employment and his finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) as they are unchallenged on appeal and not adverse to claimant. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

jurisdiction the instant case arises, has held that evidence demonstrating that pneumoconiosis hastened the miner's death establishes that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2).³ *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Corp.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); 20 C.F.R. §718.205(c)(2).

Claimant, on appeal, argues generally that the administrative law judge erred in denying benefits because the autopsy, medical opinion, and x-ray evidence showed that the miner had pneumoconiosis. Claimant, however, is required to establish, in addition to the existence of pneumoconiosis, that the miner's death was due to pneumoconiosis under Section 718.205(c). See *Neeley, supra*. Claimant adds that the administrative law judge failed to consider the fact that a claims examiner, in a letter dated April 29, 1979, stated that the miner was permanently disabled due to pneumoconiosis. Since the survivor's claim in the instant case was filed after January 1, 1982, and there is no evidence in the record that the miner was found to be entitled to benefits as a result of a claim filed prior to January 1, 1982, claimant cannot establish entitlement by showing that the miner was disabled due to pneumoconiosis. See 20 C.F.R. §718.1; Director's Exhibit 1.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that claimant failed to establish that coal worker's pneumoconiosis was a cause of, or a substantially contributing cause or factor leading to the miner's death pursuant to Section 718.205(c). The certificate of death, signed by Dr. Cholak, listed the immediate cause of death as prostate cancer, and provided no other cause of death.

³ Inasmuch as the miner's most recent coal mine employment appears to have occurred in Ohio, Hearing Transcript at 9, the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Although the administrative law judge cited the decision of the United States Court of Appeals for the Third Circuit in *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1984), the administrative law judge did not commit reversible error inasmuch as the Sixth Circuit in *Brown* adopted the standard enunciated in *Lukosevicz*, that pneumoconiosis substantially contributes to death if it hastens the miner's death. See *Brown v. Rock Creek Mining Corp.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); Decision and Order at 5.

Director' s Exhibit 3. Dr. Villaverde, in the autopsy report, diagnosed, *inter alia*, anthracosis of lung, but provided no opinion as to the cause of the miner' s death. Director' s Exhibit 4. Dr. Antalis, whom the administrative law judge recognized as the miner' s treating physician, Decision and Order at 6, found that the miner died from prostate carcinoma, but stated also that "pneumoconiosis acquired from 44 years of coal mining was an aggravating factor in his death." Director' s Exhibits 5, 6. After reviewing the autopsy evidence, Dr. Long diagnosed coal worker' s pneumoconiosis but found that death was due to prostate cancer, stating that coal worker' s pneumoconiosis did not cause, contribute to, or hasten the miner' s death. Director' s Exhibit 8. Dr. Caffrey found that the miner did not suffer from coal worker' s pneumoconiosis and that the miner died from prostate cancer. Dr. Caffrey further stated that even if the miner had coal worker' s pneumoconiosis, he did not know of any way that it would have aggravated the miner' s prostatic cancer. Director' s Exhibit 18. Dr. Kleinerman diagnosed coal worker' s pneumoconiosis and found that the miner' s death resulted from prostatic carcinoma. Dr. Kleinerman also stated that pneumoconiosis did not contribute, in any way to, or hasten the miner' s death. Employer' s Exhibit 1.

In weighing the evidence under Section 718.205(c), the administrative law judge initially acknowledged that any condition that hastened the miner' s death is a substantially contributing cause of death under Section 718.205(c)(2). See *Brown, supra*. The administrative law judge discredited the opinion of claimant' s treating physician, Dr. Antalis, because his opinion on the effect of pneumoconiosis on the miner' s death is unexplained, and because it is contrary to the reports of other physicians of record, who include two Board-certified pathologists and a pulmonary specialist. Decision and Order at 6. The administrative law judge added, "Dr. Antalis should have provided an explanation for his finding, particularly since it is not evident from the record how claimant' s death from metastatic [sic] involvement carcinoma of the prostate gland could be aggravated by simple coal workers' pneumoconiosis. In contrast, the opinions of Drs. Caffrey and Kleinerman are well reasoned." *Id.*

The administrative law judge permissibly discredited the opinion of Dr. Antalis on the grounds that it was unexplained.⁴ See Director' s Exhibits 5, 6; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, the administrative law judge properly found that the opinions of Drs. Caffrey and Kleinerman are well reasoned. As noted by the administrative law judge, Dr. Kleinerman reviewed the autopsy protocol and slides, medical records, and pulmonary function studies and explained how this documentation supported his conclusion that pneumoconiosis did not contribute to, hasten, or aggravate the miner' s death. Decision and Order at 6; Employer' s Exhibit 1. Similarly,

⁴ In letters dated November 1, 1994 and February 14, 1996, Dr. Antalis stated that although the miner "died from metastatic involvement carcinoma of the prostate gland, I feel that the pneumoconiosis acquired from 44 years of coal mining was an aggravating factor in his death." Director' s Exhibits 5, 6. Dr. Antalis, however, did not provide the basis for his opinion that pneumoconiosis was a factor in the miner' s death. *Id.*

Dr. Caffrey explained how his review of the autopsy protocol and slides and medical opinions supported his conclusion that the miner's coal mine employment did not contribute to or hasten his death. Decision and Order at 5; Director's Exhibit 18; see *Clark, supra*. The administrative law judge also permissibly gave greater weight to the opinions of Drs. Caffrey and Kleinerman on the basis that they were Board-certified pathologists.⁵ Director's Exhibit 18; Employer's Exhibit 1; see *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). Therefore, as the administrative law judge permissibly discredited Dr. Antalis's opinion, the only evidence sufficient to establish that pneumoconiosis hastened death, and permissibly credited the contrary opinions of record, we affirm the administrative law judge's finding that claimant has not shown that coal worker's pneumoconiosis was a cause of, or substantially contributing cause or factor leading to, the miner's death.⁶ 20 C.F.R. §718.205(c)(1), (c)(2); see *Brown, supra*.

⁵ The record does not contain the credentials of Dr. Antalis.

⁶ The administrative law judge did not make a finding as to whether the presumption set forth at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(3). The administrative law judge's error in this regard is harmless since the record contains no evidence of complicated pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge ' s Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge